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No. 61-65

In the Supreme Court of the United States

October Term, 1961

Ford, Bacon & Davis, Petitioners

v.

United States of America

Standard Oil Producing Co., Inc., Petitioner

v.

United States of America

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 788

FONG FOO AND ROBERT KNUPP, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 789

STANDARD COIL PRODUCTS CO., INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (S. Pet. App. B, 5–29; F. Pet. App. A, 1–22)[1] is not yet reported.

[1] "Tr." refers to the transcript of proceedings in the district court. "S. Pet." refers to the petition of Standard Coil Products Co., Inc., for a writ of certiorari. "F. Pet." refers to the petition of Fong Foo and Robert Knupp for a writ of certiorari.

JURISDICTION

The order of the court of appeals was entered on February 2, 1961 (S. Pet. App. C, 30). Mr. Justice Frankfurter, by orders entered on February 27 and 28, 1961, extended the time for filing of petitions for writs of certiorari to and including March 15, 1961, and the petitions were filed on March 7, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a trial judge has power to order an acquittal, as distinguished from a mistrial, prior to the completion of the government's presentation of evidence and without knowledge of the testimony yet to be heard, because of the trial judge's own view of the credibility of the early part of the testimony, or because of his disapproval of the conduct of government counsel.

2. Whether the court of appeals may issue a writ of mandamus to void such an order.

3. Whether, where a void order of acquittal was entered upon their own motion, the defendants may complain that a new trial would subject them to double jeopardy.[2]

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[2] Question 1 appears in the corporate petitioner's Questions 3, 4, and 6, and the individual petitioners' Question 3.

Question 2 appears in the corporate petitioner's Questions 2 and 5 and the individual petitioners' Question 2.

Question 3 appears in the corporate and individual petitioners' Question 1.

RULE INVOLVED

Rule 29(a), F.R. Crim. P., provides in pertinent part:

> Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. * * *

STATEMENT

Petitioners were charged in the United States District Court for the District of Massachusetts with falsification, and conspiracy to falsify, tests of radiosondes[3] being manufactured by the corporate petitioner under contract with the Army Signal Supply Agency. The criminal statutes asserted to be violated were 18 U.S.C. 371 and 1001. Motions to dismiss the indictment were denied.

In the opening statement to the jury, government counsel stated that the government would first present evidence explaining the instruments and testing procedures and then evidence of the deliberate falsification of the tests (Tr. of the opening statement by Mr. Caner, pp. 2–8; see also Tr. 30, 180, 155A–43).

[3] These are electronic devices for furnishing weather data designed to be dropped from airplanes in remote places and, while floating to earth by parachute, to transmit continuous radio signals in Morse code indicating the temperature, pressure, and humidity of the air through which they pass (Tr. 26, 28, 36–39).

The first government witness briefly identified three exhibits (Tr. 2–7). The next witness was the Quality Assurance Representative of the Army Signal Supply Agency who had been stationed at the corporate petitioner's plant to supervise inspection of the radiosondes. He described the operation of the radiosondes and the procedures for testing and reporting the tests. During the testimony, the trial judge participated extensively in the questioning (Tr. 2–3, 23, 66, 68–69, 99–100, 100–106, 171–173, 272, 307, 364–369, 394, 509–515, 517). On numerous occasions, he appeared to ridicule the witness for errors of language (*e.g.*, Tr. 92–93, 167, 155A–12, 155A–21) and the Assistant United States Attorney for his manner of proceeding (Tr. 29, 32–33, 58–59, 127, 133, 143–144, 148, 155A–31, 330, 452, 455, 506). The judge repeatedly indicated that he considered the witness' testimony unworthy of belief (Tr. 130, 139, 144, 227–228, 299–301, 322, 369, 402, 435, 442, 562, 564).

In an extensive colloquy before cross-examination of the witness was completed, the trial judge, in the absence of the jury (Tr. 370), urged the government to enter a *nolle prosequi* (Tr. 372–377). Government counsel pointed out that the particular witness was only the first of the array of witnesses and was merely testifying to preliminary explanatory matters (Tr. 377–381). The trial judge stated that, "if in the end the Jury did believe this witness, I think it would be almost inevitable that I would have to set aside the verdict" (Tr. 377). He further stated: "I do not believe that there is a chance that this Jury will convict"

and asked confirmation of this estimate by the court clerk, who replied, "So far" (Tr. 381–392). After this incident, the cross-examination continued (Tr. 384).

After a third witness had briefly testified in identification of certain charts (Tr. 567–598), the government called the corporate petitioner's final inspector of radiosondes to testify (Tr. 599–600). Toward the end of a day, and after conduct by the trial judge similar to his treatment of the examination of the Quality Assurance Representative (Tr. 602–604, 611–613, 625–627, 630, 636–638, 662, 663–664, 666–667, 677–678, 682, 685–686, 689, 706), this witness was asked on direct examination for the date of a conference he had been invited to attend at the plant office with counsel for the corporate defendant. He said at first that he did not remember the date (Tr. 681). When pressed for his best recollection, he said that he thought the meeting was early in 1958, he believed in February, but was not sure (Tr. 681). The next morning, while still on direct examination, the witness was again asked if he was certain of the date of the conference and he again said he was not. On being asked once more for his best recollection he said, "Approximately September 1957" (Tr. 693). The judge then asked the witness if he had talked with government counsel while testifying in the case, and the witness said that he had. The judge remarked that in a criminal case that was not "correct" (Tr. 693–694).

On cross-examination by counsel for the corporate defendant, the witness admitted that he had changed

his testimony as to the date of the meeting as a result of a conference with government counsel during the preceding overnight recess (Tr. 704–706). The judge then excused the jury and asked the Assistant United States Attorney involved if he wished to make any statement "as a matter of personal privilege" (Tr. 707). The latter answered that he was unaware of any reason why he should not talk with the witness during a recess called in the course of the witness' direct examination and denied that there was any impropriety in his having done so (Tr. 707). The judge then ordered the witness to leave the courtroom (Tr. 707). After the Assistant United States Attorney again denied any impropriety in what he had done, the judge said, "You will very soon learn." He addressed the Assistant United States Attorney as follows (Tr. 707–708):

> You were here and you knew he was on the stand. You knew there was a recess. You know the principle that a witness must be examined in public. You know that, without suggesting for a moment that you offered any improper inducement, tampering with a witness is one of the most dangerous things in connection with a case, and particularly a criminal case, that a person should be left entirely alone during the course of his testimony. You must know that elementary fact and elementary rule.

During a further colloquy the judge said that he did not mean that counsel for the government were personally and deliberately doing something they "knew to be wicked," but that he was only interested in finding out whether the "situation" was one in which he

"must act in response to a motion." After more discussion in the course of which the judge again suggested that the "situation" might require him to act "in response to a motion," counsel for each defendant moved for judgment of acquittal (Tr. 710–713).

Counsel for the government opposed these motions on the ground that the witnesses so far heard were not vital to the case but were intended only to lay the basis for concrete testimony of guilt to follow. He stated that there were many government witnesses in attendance in the courtroom yet to be heard. He suggested that the most that should be done would be to strike the testimony of the witness under examination (Tr. 713–714).

At the conclusion of government counsel's statements, the judge recalled the jury, ordered the witness back to the stand, and opened an extensive statement to the jury as follows (Tr. 714):

> Mr. Foreman and Members of the Jury, before I say anything else, let me make it absolutely clear that counsel for the defendants as well as the Court are persuaded that neither the United States Attorney nor either of his assistants consciously or deliberately violated any canon with which they were familiar. They were acting subjectively in good faith, and I do not mean at any stage of the remarks I am about to make to criticise them in the sense that I believe that they were conscious wrongdoers.

Following this, the judge made a statement implying that he considered the Assistant United States Attor-

ney's conference with the witness during a recess to be a serious infringement of the defendants' civil rights and that he regarded the testimony of the two principal witnesses produced by the government to be wholly unworthy of belief. He said that both witnesses showed "a lamentable lack of awareness or lack of capacity in connection with their testimonial obligations" and that the witness then on the stand "has shown either a lamentable lack of memory or an extraordinary power of inventiveness" (Tr. 714–718).

At the conclusion of his remarks, the judge said to the jury that, acting in response to the motions for acquittal made by counsel for the individual defendants and the corporate defendant, "I direct you at this stage to return the verdicts of acquittal with respect to each of the individuals and with respect to the corporation." The judge then directed the defendants to stand up and announced, "You have been acquitted by direction of the Court and by the Court. Your bail is terminated. You are free" (Tr. 718). The next day a written judgment of acquittal was entered (S. Pet. App. E, 46). The judge thereafter denied the government's motion to vacate the judgment of acquittal and to reassign the case for retrial (F. Pet. 11).

The government sought a writ of mandamus in the Court of Appeals for the First Circuit directing that the purported judgment of acquittal be vacated. The court of appeals granted this relief and ordered that the case be reassigned for trial before another judge.

ARGUMENT

I

The basic question in this case is whether a trial judge has power to label as a judgment of acquittal an order which in no sense represents a judgment going to the merits, and by so doing to free the defendants from the necessity of standing trial on the indictment returned by a grand jury. If he has no such power, then it necessarily follows that the court of appeals can by mandamus declare the order void, and that trial of the issue on the merits would not violate double jeopardy. We submit that the court below properly held that the great power of district judges to control the trial of a criminal case does not extend so far as to permit such a usurpation of power as that undertaken by the trial judge in this instance.

A. The trial judge lacked power to enter the judgment of acquittal before the government had even begun to present the substance of its case.

1. There was no power to grant the motion on the ground that the government witnesses were not worthy of belief. An acquittal, as distinguished from other ways of terminating a trial, is normally an absolution of guilt granted on the evidence. Rule 29(a), F. R. Crim. P., *supra*, p. 3, provides that a judgment of acquittal shall be entered "after the evidence on either side is closed" if the evidence is "insufficient to sustain a conviction."[4] The trial judge therefore

[4] Petitioners' reliance (S. Pet. 14–18; F. Pet. 21) on language from *United States* v. *Weissman*, 266 U.S. 377, is misplaced and was properly rejected *sub silentio* by the court of appeals.

[Continued next page]

has no power to acquit until the government's evidence has been presented. Normally, this will be at the close of the government's case although in exceptional circumstances the insufficiency of the evidence may be demonstrated earlier, as where the government's opening statement shows that the evidence it proposes to introduce cannot support a conviction, or where a stipulation by the government shows a conclusive defense. *United States* v. *Maryland Cooperative Milk Producers, Inc.*, 145 F. Supp. 151 (D. D.C.).

No such exceptional situation existed here. The government's evidence to which the judge first objected involved only preliminary matters not necessary to prove the offense alleged (see *supra*, pp. 3, 4). Before directing the acquittal, the trial judge also noted that a witness had changed his testimony concerning the date of a particular conference. The conference was to be one small and unessential portion of the proof of the conspiracy (see *supra*, p. 7). Furthermore, the government had indicated its intention to prove the date of the conference by other wit-

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In *Weissman*, the government sought to proceed in the Supreme Court by writ of error and the decision was that by reason of the specific statutory language such a writ would not lie whether the order there were treated as a quashing of an indictment (as contended by the government) or as a direction of a verdict (as phrased by the trial judge). The further language of Mr. Justice Holmes that an opening by counsel or the offer of evidence is not always necessary to a verdict of acquittal must be considered in the light of the fact that since 1924, when that decision was written, Rule 29(a) has been adopted.

nesses.[5] The trial judge could not possibly have known whether the numerous government witnesses still to be called could repair any earlier weaknesses of testimony—weaknesses which were, indeed, largely matters of credibility for the jury. And in determining whether a judgment of acquittal is warranted, even after the government has had an opportunity to present all its evidence, the judge is under a duty to resolve questions of credibility and draw the inferences favorable to the government. See *Curley* v. *United States,* 160 F. 2d 229, 232–235 (C.A. D.C.), certiorari denied, 331 U.S. 837; *United States* v. *Empire Packing Co.*, 174 F. 2d 16, 18–19 (C.A. 7), certiorari denied, 337 U.S. 959.

The constitutional provision for trial by jury does not concern the defendant alone. Article 3, Section 2, clause 3, states in terms that the trial "shall be" by jury, thereby creating a right in the people generally and in their government to have criminal prosecutions tried. The government's consent is therefore required to waive a jury trial. See *Patton* v. *United States,* 281 U.S. 276, 312; Rule 23(a), F. R. Crim. P.[6] More broadly, this Court in *Ex parte United States,*

[5] The trial judge had himself stated that the conversation could be proved "aliunde" (Tr. 712).

[6] The framers of the Federal Rules of Criminal Procedure, although urged to delete from their preliminary drafts the requirement of what is now Rule 23(a) for consent of the government to waiver of a jury, deliberately refused to do so. See the comments on Rule 21(a) (the present 23(a)) in the comments by members of the bar, circulated to all members of the Advisory Committee (Vols. I and II, mimeographed (1943)). See also Stewart, *Comments on Federal Rules of Criminal Procedure*, 8 John Marshall L.Q. 296, 301 (1943).

287 U.S. 241, 249, upheld the "absolute right" of the government, as the representative of the public, "to put the accused on trial"; and in *United States* v. *Thompson*, 251 U.S. 407, 415, the court overruled an "assertion of the judicial discretion * * * incompatible with * * * the right of the Government to initiate prosecutions for crime * * *."

Without presentation, in some form, of the whole of the government's evidence, an acquittal on the evidence is a usurpation of power. The distinction is not, as the individual petitioners would have it (F. Pet. 21), between error and outrageous error, but is instead, as the court of appeals held (S. Pet. App. B, 12a, 16a, 17a), the distinction between an erroneous decision in a matter properly before the trial court and a decision made long in advance of power to make a decision at all.[7]

[7] Petitioners claim (S. Pet. 16, 19; F. Pet. 25) a conflict with *Heath* v. *United States*, 260 F. 2d 623 (C.A. 9). That case, however, involved a dismissal of the indictment, and not, as here, a judgment of acquittal. Obviously there was power to order such a dismissal at the outset of the trial, since it does not turn upon the factual question of guilt but upon total "inability of the prosecution to proceed to trial" (*id.* at 632). The court's remark that the order was equivalent to a judgment of acquittal, like its analogizing of the order to one under Rule 48(b), F.R. Crim. P. (failure to prosecute), was merely in reference to the similarity of all three types of order in not being directly appealable by the government.

The corporate petitioner's efforts (S. Pet. 18) to analogize, in addition, the loss of records in *Heath* to the circumstances here must fail for the dual reason that no critical loss of records occurred (Tr. 508–509, 523–542) and no such facts were relied upon in the purported acquittal. See *United States* v. *Apex Distributing Co.*, 270 F. 2d 747 (C.A. 9), where the court of appeals said: "Since this reason [government fail-

2. The trial court also lacked power to direct a judgment of acquittal because of the purported misconduct of government counsel. Ordinarily a district court has no power to order a judgment of acquittal without an adjudication on the merits of guilt or innocence. The proper remedies for misconduct are to declare a mistrial and to discipline the attorney. The only exceptions which we can imagine involve either misconduct by the government which prevents a fair trial from ever being held (for example, where a key defense witness is deported to prevent him from testifying) or the government's deliberate refusal to obey a valid court order. Thus, a dismissal may result from the government's refusal to obey an order to produce documents which may be necessary for the defense to present its case adequately. *Jencks* v. *United States*, 353 U.S. 657, 672.[8]

Neither situation exists here. The trial judge himself specifically stated that government counsel had not engaged in any deliberate misconduct (see *supra*, pp. 6, 7). Actually, as the court of appeals held (see S. Pet. App. B, 15, 16), there was no misconduct at all. The trial judge himself had earlier suggested to a government witness that he "rehearse" his testimony

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ure to produce documents] has nothing to do with the merits of the criminal actions, it was wholly inappropriate to dismiss them 'with prejudice'" (*id.* at 750).

[8] Congress, however, provided in 18 U.S.C. 3500 the lesser remedy of striking the testimony of the witness from the record unless the court determines "that the interests of justice require that a *mistrial* be declared" (emphasis added).

with counsel (Tr. 111). No American decisions, canons of bar associations, or other authority have been disclosed prohibiting discussion between counsel and a witness. A lawyer may even "properly" interview a witness for the opposing side, the test being, of course, whether the witness is induced to lie on the witness stand. American Bar Association, *Canons of Professional Ethics,* Canon 39; see also Drinker, *Legal Ethics* (1953), 85; *Capitol Cab Corp.* v. *Anderson,* 85 N.Y.S. 2d 767, 770–771, affirmed, 100 N.Y.S. 2d 39. Indeed, it would have been improper for counsel to have left standing the witness' incorrect estimate of the date, when he knew it to be wrong. See *Napue* v. *Illinois,* 360 U.S. 264, 269.

3. We are forced to the conclusion, therefore, that this case involves an extraordinary aberration—an assertion of non-existent power which lacked legal significance. The trial judge's action was substantially the same as if he had walked into the court room on the first day of trial and directed an acquittal without further ado. And since the judgment of acquittal had no foundation in legal power, it was a nullity.

B. Under these circumstances, the court of appeals had power to vacate the order of acquittal by writ of mandamus. In *United States* v. *Smith,* 331 U.S. 469, this Court granted a writ of mandamus directing the district court to vacate its order granting a new trial *sua sponte,* because the order was untimely and therefore beyond the court's power. See also *La Buy* v. *Howes Leather Co.,* 352 U.S. 249, 256; *Beacon Theatres* v. *Westover,* 359 U.S. 500, 511. In *Ex parte*

United States, 287 U.S. 241, 245–249, this Court itself issued a writ of mandamus—without even requiring that the government first seek relief in the court of appeals—which directed the district judge to set aside an order refusing to issue a bench warrant and to issue the warrant. The Court noted that the district judge's conduct was "equivalent to a denial of the absolute right of the government, as matters stand, to put the accused on trial" (*id.* at 249). The Court also stated (*id.* at 246):

> * * * *McClelland* v. *Carland*, 217 U.S. 268, 280, laid down the general rule applicable both to this court and to the circuit courts of appeals, that the power to issue the writ under R.S. § 716 is not limited to cases where its issue is required in aid of a jurisdiction already obtained, but that "where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below" [citing authorities]. * * *

See also *Ex parte United States*, 242 U.S. 27. Similarly, here the order of acquittal before the government had had any real opportunity to prove its case effectively prevented the government from putting the accused on trial. And the court of appeals could properly issue the writ in order to protect its ultimate power to review the case upon a proper appeal that would be unclouded by a purported order of acquittal which the trial judge had no authority to enter.

C. Petitioners' chief reliance is upon the claim that a new trial will subject them to double jeopardy. This

issue is closely related to the question before the Court in *Gori* v. *United States*, No. 486, this Term—whether a defendant can be retried following a mistrial erroneously declared by the district judge *sua sponte*. Consequently, the Court might wish to hold this petition pending the outcome of the *Gori* case.

It should be noted, however, that the instant case is significantly different from *Gori* v. *United States* because here petitioners, who were represented by counsel, moved for the very judgments of acquittal which the trial court erroneously granted. Petitioners specifically requested the order of the court which interrupted their trial. True, they undoubtedly hoped to secure a judgment which, unlike a mistrial, would bar ever putting their guilt in issue, but having themselves invited the action that was beyond the power of the trial judge, and having themselves thereby obtained the untimely and unlawful interruption of the first trial, they cannot now complain of the consequences of the invitation.[9]

II

Although the issues in this case are novel, and some of them are not without difficulty, there is no pressing

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[9] The corporate petitioner also complains of the portion of the mandamus order which directs that the case be reassigned to another trial judge. Such an order clearly lies within the power of the court of appeals in aid of its power to issue a writ of mandamus under 28 U.S.C. 1651(a). See *United States* v. *Malmin*, 272 Fed. 785, 792 (C.A. 3); *American Chain and Cable Company* v. *Federal Trade Commission*, 142 F. 2d 908, 912 (C.A. 4); *Schwab* v. *Coleman*, 145 F. 2d 672, 678 (C.A. 4). In *Calcaresi* v. *United States*, 348 U.S. 961, this Court itself, in the exercise of its supervisory powers, reversed convictions and remanded the cause for retrial before a different judge.

necessity for the intervention of this Court. Any problems of judicial decorum appear to have been satisfactorily resolved within the First Circuit. And the very novelty of the legal issues suggests the inappropriateness of certiorari.

Neither the court below nor either party has been able to discover any case in which a trial court has acquitted a defendant because the government's witnesses were unconvincing, where the court had not heard even the principal government witnesses and had no knowledge of the testimony they would give. Similarly, no case has been found where a trial court has ordered acquittal, as contrasted to a mistrial, because of admittedly unintentional and isolated misconduct (even assuming *arguendo* that misconduct were involved here) of the prosecutor. Thus, while the issues presented by petitioners may superficially appear to be important, they in fact involve a unique situation in Anglo-American jurisprudence which lacks the general importance that would call for further review. There is not the slightest reason to suppose that the case will ever be repeated.

These circumstances might not be sufficient for a denial of certiorari if there were a showing that petitioners were in danger of suffering substantial and irreparable injury. But at this stage petitioners are faced with nothing more serious than the inconvenience of a new trial. If they are acquitted, the issues which they raise will be moot. If, on the other hand, they are convicted, all the issues raised now can properly be raised upon review of the conviction.

Therefore, if anything to be decided in *Gori* v. *United States* suggests that petitioners were subjected to double jeopardy, they will have full opportunity to seek protection initially in the courts below, and ultimately in this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1961.

U.S. GOVERNMENT PRINTING OFFICE: 1961